IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 196 OF 2005

Narang Overseas Private Ltd. .. Petitioner
V/s.
Mr. V. Mohan Kumar, & Ors. .. Respondents

Mr. S.E. Dastur, Sr. Advocate with Mr. Sanjeev M. Shah i/b. M/s. Soloman & Co. for the Petitioner

Mr. R.V. Desai, Sr. Advocate with Ms. S.V. Bharucha for the Respondents

CORAM : S. RADHAKRISHNAN &
J.P. DEVADHAR, JJ.
DATED : 28.02.2005

P.C.:-

1. Rule. Rule made returnable forthwith. Heard the learned counsel for the Petitioner and the Respondents. The learned counsel for the Respondents waives service. By consent, taken up for final hearing.

2. In an assessment order dated 28.10.2004 for the Assessment year 2002-2003, the Assessing Officer rejected the contention of the Petitioner that the sum of Rs. 33,47,01,137/- received by way of mesne profits was not taxable & brought the same to tax. Aggrieved by the aforesaid assessment order, the Petitioner has already filed an Appeal before the Commissioner of Income Tax (Appeal). Before the Commissioner of Income Tax (Appeal), the said Appeal was taken up for hearing on 31.12.2004, 10.1.2005, 9.2.2005 and now the same stands adjourned to 4.3.2005, in view of the fact that the concerned Commissioner of Income Tax (Appeal) was assigned Election duty.

3. The Petitioner has filed this Petition, basically challenging the order dated 12.1.2005 passed by the Commissioner of Income Tax Central-III, declining to grant stay of recovery of demand for Assessment Year 2002-2003.

4. We have perused the order passed by the Income Tax Appellate Tribunal dated 16.12.2004 in the assessee's own case. In that case relating to the block period 1.4.1990 to 7.11.2000 while dealing with the similar issue of mesne profits, the Tribunal at paragraph 31 has observed as under:-

> " We are also of the view that the authorities below have mixed up the two types of payments which are distinct in character and are made for separate purposes. We thus see no substance in the conclusions, which rest on the aforesaid erroneous perceptions, to the effect that the receipts by the assessee are in the nature of commission and revenue earnings."

5. Thereafter, of course, the Tribunal in paragraph 40 of the said order has stated that the Tribunal was not going into the issue whether the mesne profits are liable to be taxed in the hands of the assessee or not as the same was not really relevant in the case which was before the Tribunal, as the Tribunal was concerned with the issue of block assessment.

6. Shri Dastur, the learned senior counsel appearing for the Petitioner also brought to our notice that the entire tax liability including the interest comes to Rs. 16.43 Crores and he also brought to our notice that the Assistant Commissioner of Income Tax has already issued an order of attachment with regard to the above claim with the HDFC. Mutual Fund, wherein the Petitioners have invested a sum of Rs. 18 Crores. In other words, the submission of Shri Dastur, is that the Revenue is totally protected inasmuch as the entire tax liability with the accrued interest, is fully protected by the said attachment order.

7. Under these circumstances, Shri Dastur, the learned senior counsel submitted that the Petitioner have a prima facie case and as the Revenue is fully protected and also in view of the Commissioner of Income Tax (Appeal) has already heard the above Appeal on three dates and now the matter is kept on 4.3.2005, in the larger interests of justice, the stay ought to be granted, till the disposal of the Appeal pending before the Commissioner of Income Tax (Appeals).

8. Shri Desai, the learned senior counsel appearing on behalf of the Respondents, strongly justified the order

of the Commissioner of Income Tax rejecting the said Application for stay of recovery and contended that the

Revenue ought to be protected and a mere attachment order will not suffice. He also contended that the Petitioners have failed to show any financial hardship in the above.

9. Having regard to all the facts and circumstances of the case, specially with regard to the issue, whether the mesne profits received by the assessee are liable to be taxed or not being prima facie held by the Tribunal in the proceedings pertaining to the block period in favour of the assessee and in view of the fact that appeal filed by the assessee is substantially heard by the C.I.T. (Appeals) and in view of the fact that the Revenue is fully secured by the attachment order, we are of the opinion that the Petitioner has made out a case for grant of stay. However, we make it expressly clear that we are not expressing any opinion as regards the above prima facie opinion given by the Tribunal in the proceedings relating to block assessment.

10. Under the aforesaid facts and circumstances, while allowing the Writ Petition, we direct the Commissioner of Income Tax (Appeals) to expeditiously dispose of the pending Appeal. Attachment levied by the Income Tax authorities to continue till the disposal of the above

Appeal. In the event, the order to be passed in the said Appeal is adverse to the Petitioner, then the recovery proceedings against the Petitioner shall stand stayed for

a period of four weeks from the date of the communication of the said order by the Commissioner of Income Tax (Appeals) to the Petitioner. Rule is made absolute in the above terms.

(S. RADHAKRISHNAN, J.)

(J.P. DEVADHAR, J.)